Lim Poh Ming v Deputy Minister of Home Affairs & Ors

HIGH COURT (TAIPING) — ORIGINATING SUMMONS NO 24–2 OF 1997
ZULKEFLI J
26 JUNE 1997

Administrative Law *— Exercise of administrative powers — Restricted residence — Validity of order — Whether court was precluded from referring to the allegation of facts to ascertain whether plaintiff was involved in crimes involving violence — Whether restriction order was defective due to non-compliance with provisions of Emergency (Public Order and Prevention of Crime) Ordinance 1969 — Whether there was a lawful authorization of detention — Whether length of time needed for the designated officer to apply his mind before he submits his report to the Deputy Minister is of paramount importance*

The plaintiff was arrested and detained by the police since 11 September 1994. His arrest for the purpose of investigation under s 3 of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ('the Ordinance') only commenced on 23 September 1994. The Deputy Minister of Home Affairs ('the Deputy Minister'), upon receipt of a report pertaining to information of the plaintiff's arrest under the Ordinance and having satisfied himself that the plaintiff's activities threatened public security, issued a restriction order ('the restriction order') directing the plaintiff to be placed under a restricted residence for a period of two years beginning from 20 November 1994. The plaintiff was alleged to have been a member of a secret society committing criminal activities involving violence. Before the completion of the period of the restriction order dated 19 November 1994, the Deputy Minister on 19 November 1996 issued an order for the extension of the restriction order ('the extension order') for another two years commencing from 20 November 1996. Both orders were based on the same grounds and allegation of facts as required under s 4(4)(a) and (b) of the Ordinance.

The plaintiff sought a declaration that the restriction order was bad in law and was of no effect. The plaintiff contended that the Deputy Minister had exercised his powers to issue a restriction order under the wrong limb of s 4(1) of the Ordinance, and therefore had not applied his mind properly and correctly to the grounds upon which the order was made. On the other hand, it was submitted that there was no question of the Deputy Minister invoking the wrong limb of s 4(1) as the Deputy Minister in his affidavit-in-reply had averred that he was satisfied that the activities of the plaintiff were prejudicial to public order. It was further submitted that the court was not empowered to examine the factual basis in which the Deputy Minister declared his satisfaction on the issuance of the restriction order.

It was also submitted that as there was no explanation for the detention of the plaintiff from 11 September to 23 September 1994,

the plaintiff's detention was therefore unlawful. It was argued further that there had been a breach of the provision of s 3(3)(c) of the Ordinance wherein the police officer designated by the Inspector General of Police to report the circumstances of the arrest and detention of the plaintiff to the Deputy Minister had failed to apply his mind properly to the report before he referred the matter to the Deputy Minister.

Held, ordering that the plaintiff be released:

(1) The court is not precluded from referring to the allegation of facts to ascertain whether the plaintiff was involved in crimes involving violence as this does not mean that the court was reviewing or challenging them as not being within the scope of the Ordinance. The court is only examining the allegation of facts that had been made known to the plaintiff for the purpose of ascertaining whether they appear to be consistent and within the purview of the stated purpose of any of the two relevant limbs of s 4(1) of the Ordinance. A scrutiny of the grounds is necessary to ascertain whether the Deputy Minister had applied his mind properly to the correct and appropriate limb of s 4(1) of the Ordinance. Failure to do so would tantamount to a non-compliance with the procedural requirement of the Ordinance governing such act or decision of the Deputy Minister which empowers the court to exercise its powers of judicial review.

On the facts, a member of a secret society committing criminal activities involving violence cannot appropriately fit into the first limb of s 4(1) of the Ordinance but more appropriately may fit within the purview of the second limb of s 4(2) being crimes involving violence. Therefore, the restriction and extension orders made by the Deputy Minister appeared to be defective due to non-compliance with the appropriate provisions of the Ordinance (see pp 628B–E, I and 629A–C); *Menteri Hal Ehwal Dalam Negeri & Anor v Lee Gee Lam and another application* [1993] 3 MLJ 673, *Chia Khim Seng v Deputy Minister of Home Affairs & Ors* [1997] 2 CLJ Supp 205 and *Minister of Home Affairs Malaysia & Anor v Karpal Singh* [1988] 3 MLJ 29 followed.

(2) It is the duty of the defendants as a determining authority to prove that the plaintiff had been lawfully detained at all material times from 11 September 1994 until the date of the restriction order was issued on 19 November 1994.

Since there was no affidavit affirming the validity of the detention from 11 September until 23 September 1994, a doubt existed as to whether the plaintiff's detention during that period was legal. Furthermore, if the detention of a person is a continuation of an earlier unlawful detention, then the second or subsequent detention is unlawful. In this case, since the defendants were not in a position to explain and show that there was lawful authorization of the plaintiff's detention for the initial period

from 11 September until 23 September 1994, the plaintiff's detention from 23 September 1994 onwards would still constitute unlawful detention. This was due to the fact that the detention on 23 September 1994 had flowed from the earlier unlawful detention effected on 11 September 1994 (see pp 629G–I and 630A–B); *Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd* [1986] 1 MLJ 382 and *Baharuddin bin Kamsin v Pihak Berkuasa Sidang Panglima Armada Pengkalan & Anor* [1996] 4 MLJ 184 followed.

(3) The length of time needed for the designated officer to apply his mind before he submits his report to the Deputy Minister is not of paramount importance. What is most important is whether the designated officer had really applied his mind to the matter before him and was satisfied that the matter should be reported to the Deputy Minister.

In the present case, there was an interval period of five minutes between the receipt of the report by the designated officer from his subordinate officer and its transmission to the Deputy Minister. The designated officer in his affidavit had also averred that he had studied the matter before him and was satisfied that the matter be reported to the Deputy Minister. In the circumstances of this case, the plaintiff's contention that the designated officer had not applied his mind properly and sufficiently before transmitting the report to the Minister must be rejected (see p 631A–E); *Tan Yap Seng v Ketua Polis Negara & Ors* [1991] 2 CLJ 1400 and *Yap Hai Sing v Menteri Hal Ehwal Dalam Negeri Malaysia & Anor* [1995] 3 AMR 2120 distinguished.

[Bahasa Malaysia summary

Plaintif telah ditangkap dan ditahan oleh polis sejak 11 September 1994. Tangkapannya untuk tujuan penyiasatan di bawah s 3 Ordinan Darurat (Ketenteraman Awam dan Mencegah Jenayah) 1969 ('Ordinan tersebut') hanya bermula pada 23 September 1994. Selepas menerima laporan mengenai maklumat tangkapan plaintif di bawah Ordinan tersebut dan berasa puas hati bahawa kegiatan plaintif mengancam keselamatan awam, Timbalan Menteri Hal Ehwal Negeri ('Timbalan Menteri') mengeluarkan satu perintah sekatan ('perintah sekatan tersebut') yang mengarah supaya plaintif diletak di bawah kediaman terhad untuk tempoh dua tahun mulai daripada 20 November 1994. Plaintif dikatakan adalah seorang ahli kongsi gelap yang terlibat dalam kegiatan jenayah yang ganas. Sebelum tamatnya tempoh perintah sekatan tersebut bertarikh 19 November 1994, pada 19 November 1996 Timbalan Menteri mengeluarkan satu perintah untuk pelanjutan perintah sekatan ('perintah pelanjutan') untuk dua tahun lagi mulai daripada 20 November 1996. Kedua-dua perintah adalah berdasarkan alasan dan pengataan fakta yang sama seperti yang dikehendaki di bawah s 4(4)(a) dan (b) Ordinan tersebut.

Plaintif meminta satu perisytiharan bahawa perintah sekatan tersebut adalah tidak elok di sisi undang-undang dan tidak mempunyai

A sebarang kesan. Plaintif berhujah bahawa Timbalan Menteri telah melaksanakan kuasa beliau untuk mengeluarkan perintah sekatan di bawah bahagian s 4(1) Ordinan tersebut yang salah, dan oleh itu tidak mempertimbangkan alasan atas mana perintah itu dibuat dengan sewajarnya. Sebaliknya, ia dihujahkan bahawa tiada persoalan tentang Timbalan Menteri memakai bahagian s 4(1) yang salah kerana B Timbalan Menteri dalam afidavit jawapan beliau telah menegaskan bahawa beliau puas hati kegiatan plaintif menjejaskan ketenteraman awam. Ia seterusnya dihujahkan bahawa mahkamah tidak berkuasa untuk memeriksa dasar faktual dalam mana Timbalan Menteri mengisytiharkan kepuasan atas pengeluaran perintah sekatan tersebut.

C Ia juga dihujahkan bahawa oleh kerana tidak terdapat penjelasan untuk tahanan plaintif dari 11 September hingga 23 September 1994, tahanan plaintif dengan itu adalah menyalahi undang-undang. Ia selanjutnya dihujahkan bahawa terdapat pelanggaran peruntukan s 3(3)(c) Ordinan tersebut di mana pegawai polis yang dilantik oleh D Ketua Inspektor Polis untuk melaporkan keadaan tangkapan dan tahanan plaintif kepada Timbalan Menteri telah gagal mempertimbangkan laporan dengan sewajarnya sebelum merujuk perkara itu kepada Timbalan Menteri.

Diputuskan, memerintah bahawa plaintif dilepaskan:

E (1) Mahkamah tidak dikecualikan daripada merujuk kepada pengataan fakta bagi menentukan sama ada plaintif adalah terlibat dalam jenayah keganasan kerana ini tidak bermakna bahawa mahkamah sedang mengkaji semula atau mencabar mereka tidak dirangkumi oleh skop Ordinan tersebut. Mahkamah hanya F memeriksa pengataan fakta yang telah dimaklumkan kepada plaintif bagi tujuan menentukan sama ada mereka adalah konsisten dan dalam rangkuman tujuan yang dinyatakan dalam mana-mana dua bahagian s 4(1) Ordinan tersebut yang relevan. Satu pemeriksaan alasan adalah perlu bagi memastikan sama ada Timbalan Menteri telah mempertimbangkan bahagian s 4(1) G Ordinan tersebut yang betul dengan sewajarnya. Kegagalan berbuat demikian sama seperti ketidakpatuhan keperluan prosedur Ordinan tersebut yang menguasai tindakan atau keputusan Timbalan Menteri yang memberikan mahkamah kuasa untuk melaksanakan kuasa kajian semula kehakiman.

H Atas fakta-fakta, seseorang ahli kongsi gelap yang melakukan kegiatan jenayah yang ganas tidak diliputi oleh bahagian pertama s 4(1) Ordinan tersebut tetapi lebih wajarnya dalam rangkuman bahagian kedua s 4(2) iaitu kesalahan yang melibatkan keganasan. Maka, perintah-perintah sekatan dan pelanjutan yang dibuat oleh Timbalan Menteri kelihatan cacat disebabkan ketidakpatuhan I peruntukan Ordinan tersebut yang berkenaan (lihat ms 628B–E, I dan 629A–C); *Menteri Hal Ehwal Dalam Negeri & Anor v Lee Gee Lam and another application* [1993] 3 MLJ 673, *Chia Khim Seng v Deputy Minister of Home Affairs & Ors* [1997] 2 CLJ Supp

205 dan *Minister of Home Affairs Malaysia & Anor v Karpal Singh* [1988] 3 MLJ 29 diikut.

(2) Adalah menjadi tugas defendan-defendan sebagai pihak berkuasa penentu untuk membuktikan bahawa plaintif telah ditahan secara sah pada semua masa material dari 11 September 1994 sehingga tarikh perintah sekatan dikeluarkan pada 19 November 1994.

Oleh kerana tiada afidavit yang mengesahkan kesahan tahanan dari 11 September sehingga 23 September 1994, keraguan wujud mengenai sama ada tahanan plaintif sewaktu tempoh itu adalah sah. Tambahan lagi, sekiranya tahanan seseorang adalah sambungan dari tahanan yang tidak sah yang lebih awal, maka tahanan yang kedua atau yang berikutnya menyalahi undang-undang. Dalam kes ini, oleh kerana defendan-defendan tidak berada dalam kedudukan untuk menjelaskan dan menunjukkan bahawa terdapat pemberikuasaan sah atas tahanan plaintif untuk tempoh permulaan dari 11 September sehingga 23 September 1994, tahanan plaintif mulai dari 23 September 1994 masih merupakan tahanan tak sah. Ini adalah disebabkan fakta bahawa tahanan pada 23 September 1994 berpunca daripada tahanan lebih awal yang menyalahi undang-undang yang berkuatkuasa pada 11 September 1994 (lihat ms 629G–I dan 630A–B); *Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd* [1986] 1 MLJ 382 dan *Baharuddin bin Kamsin v Pihak Berkuasa Sidang Panglima Armada Pengkalan & Anor* [1996] 4 MLJ 184 diikut.

(3) Tempoh masa yang diperlukan bagi pegawai yang dilantik untuk meneliti sebelum menyerahkan laporannya kepada Timbalan Menteri bukanlah begitu penting. Apa yang paling penting adalah sama ada pegawai yang dilantik benar-benar telah meneliti perkara di hadapannya dan berpuas hati bahawa perkara itu harus dilaporkan kepada Timbalan Menteri.

Dalam kes ini, terdapat waktu selang selama lima minit antara penerimaan laporan oleh pegawai yang dilantik dari pegawai bawahan dan penghantarannya kepada Timbalan Menteri. Pegawai yang dilantik juga telah menegaskan dalam laporannya bahawa beliau telah mengkaji perkara di hadapannya dan berpuas hati bahawa perkara itu dilaporkan kepada Timbalan Menteri. Dalam keadaan kes ini, hujah plaintif bahawa pegawai yang dilantik telah tidak meneliti dengan sewajarnya dan secukupnya sebelum menghantar laporan kepada Timbalan Menteri mesti ditolak (lihat ms 631A–E); *Tan Yap Seng v Ketua Polis Negara & Ors* [1991] 2 CLJ 1400 dan *Yap Hai Sing v Menteri Hal Ehwal Dalam Negeri Malaysia & Anor* [1995] 3 AMR 2120 dibeza.]

Notes

For cases on restrictive residence, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 46–49.

Cases referred to

Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd [1986] 1 MLJ 382 (folld)

Baharuddin bin Kamsin v Pihak Berkuasa Sidang Panglima Armada Pengkalan TLDM Lumut [1996] 4 MLJ 184 (folld)

Chia Khim Seng v Deputy Minister of Home Affairs & Ors [1997] 2 CLJ Supp 205 (folld)

Menteri Hal Ehwal Dalam Negeri & Anor v Lee Gee Lam and another application [1993] 3 MLJ 673 (folld)

Minister of Home Affairs Malaysia & Anor v Karpal Singh [1988] 3 MLJ 29 (folld)

Tan Yap Seng v Ketua Polis Negara & Ors [1991] 2 CLJ 1400 (distd)

Yap Hai Sing v Menteri Hal Ehwal Dalam Negeri Malaysia & Anor [1995] 3 AMR 2120 (distd)

Legislation referred to

Emergency (Public Order and Prevention of Crime) Ordinance 1969 ss 3(3)(c), 4A(1), 4(1), 4(4)(a), (b), 7A(1)(b)(3)(a)

M Athimulan (*Athimulan & Co*) for the plaintiff.
Mohamad Abazafree bin Mohd Abbas (Federal Counsel) for the defendants.

Cur Adv Vult

Zulkefli J: By way of this originating summons, the plaintiff is seeking a declaration that the restriction order issued by the Deputy Minister of Home Affairs ('the Deputy Minister') under the provision of s 4A(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ('the Ordinance') on the plaintiff is bad in law and is of no effect. Although this is not an application for a writ of habeas corpus ad subjiciendum, the net effect of this application would be that if the court rules that there has been a non-compliance with the procedural requirement of the Ordinance governing such act or decision of the Deputy Minister in issuing the restriction order, it would empower the court to exercise its powers of judicial review. In those circumstances, if the court finds the detention of the plaintiff unlawful, then the plaintiff is entitled to be released forthwith from the area of residence under which he is being currently restricted.

The relevant facts of this case as gathered from the affidavits filed by both the plaintiff and the defendants are as follows. The plaintiff was arrested by the police on 11 September 1994 and was detained until 19 November 1994 at the Police Contingent Headquarters, Pulau Pinang. On 21 October 1994, the Deputy Minister received a report with the relevant information pertaining to the arrest of the plaintiff as provided under s 3(3)(c) of the Ordinance. Having satisfied himself that the activities of the plaintiff threatened the security of the public, he subsequently issued a restriction order directing the plaintiff to be placed under a restricted residence in the area of the town of Gemas in the district of Tampin in Negeri Sembilan for a period of two years beginning from

20 November 1994 ('the restriction order'). Attached to the restriction order were the grounds and the allegation of facts upon which the said order was made as required under s 4(4)(a) and (b) respectively of the Ordinance. Before the completion of the period of the restriction order dated 19 November 1994, the Deputy Minister on 19 November 1996 issued an order for the extension of the restriction order on the plaintiff under the provision of s 7A(1)(b)(3)(a) of the Ordinance which was to commence from 20 November 1996 for another period of two years ('the extension order'). The extension order dated 19 November 1996 was issued based on the same grounds as the restriction order dated 19 November 1994.

Before me, En M Athimulan learned counsel for the plaintiff submitted that he was proceeding with his argument on three main grounds to show that the process of arrest and the detention of the plaintiff and the subsequent issuance of the restriction order and the extension order by the Deputy Minister on the plaintiff were not effected according to law. On the first ground, it was contended on behalf of the plaintiff that there are two separate and distinct limbs under s 4(1) of the Ordinance which spell out the scope of powers of the Deputy Minister to issue a detention order or a restriction order. The decision of the (then) Supreme Court in the case of *Menteri Hal Ehwal Dalam Negeri & Anor v Lee Gee Lam and another application* [1993] 3 MLJ 673 on this point was cited as an authority for the proposition. Section 4(1) of the Ordinance which contained the said two limbs is worded as follows:

> If the Minister is satisfied that with a view to preventing any person from acting in any manner prejudicial to public order it is necessary that that person should be detained, or that it is necessary for the suppression of violence or the prevention of crimes involving violence that the person should be detained, the Minister shall make an order directing that that person be detained for any period not exceeding two years.

In this case, it was submitted for the plaintiff that the Deputy Minister was found to have issued a restriction order by invoking the first limb of s 4(1) of the Ordinance in that he was satisfied that the activities of the plaintiff were prejudicial to public order. However, learned counsel for the plaintiff submitted that a closer look of the grounds of detention made known to the plaintiff would show that the Deputy Minister should have invoked the second limb of s 4(1) of the Ordinance as the grounds of detention showed that the plaintiff was engaged in criminal activities involving an element of violence. The grounds upon which the restriction order was made that were attached to that order and served on the plaintiff is reproduced as follows:

> ALASAN-ALASAN YANG ATASNYA PERINTAH ITU DIBUAT kamu adalah seorang ahli aktif kumpulan kongsi gelap yang melakukan kegiatan jenayah kekerasan di mana tindakan kamu itu telah menjejaskan dan memudaratkan ketenteraman awam.

For the plaintiff, it was contended that since the Deputy Minister had exercised his powers to issue a restriction order under the wrong limb of

s 4(1) of the Ordinance, he therefore had not applied his mind properly and correctly to the grounds upon which the order was made. It was further contended that in the circumstances, the Deputy Minister had acted mechanically and arbitrarily when issuing the restriction order. To support the contention of the plaintiff that the Deputy Minister had acted mechanically and arbitrarily when he signed the restriction order under the wrong limb of s 4(1) of the Ordinance, the case of *Chia Khim Seng v Deputy Minister of Home Affairs & Ors* [1997] 2 CLJ Supp 205 decided earlier by this court was cited as an authority for the proposition. In that case, I had held the view that as the enabling powers of the Deputy Minister to detain a person under s 4(1) of the Ordinance are contained in two separate and distinct limbs, the Deputy Minister must be seen to be exercising his powers by invoking the correct limb in issuing the detention order. Failure to do so would lead to the conclusion that he had acted mechanically and arbitrarily. In that case, the grounds of detention and the allegation of facts showed that the applicant was involved in criminal activities relating to gang robbery. Gang robbery is an offence under the Penal Code (FMS Cap 45) which contains an element of violence. I was of the view that as between the two prescribed limbs in s 4(1) of the Ordinance, the offence of gang robbery would not fall under the first limb as being activities prejudicial to public order. I further held the view that since there are two prescribed limbs that are distinct and different from one another in their purpose as laid out under s 4(1) of the Ordinance, it would therefore follow that the grounds of detention and the allegation of facts must appear to be consistent and within the purview of the stated purpose of the detention order. Any non-compliance with such a requirement would give the court powers of judicial review in respect of the act or decision of the Deputy Minister. The principles laid down in the case of *Menteri Hal Ehwal Dalam Negeri & Anor v Lee Gee Lam and another application* on this point were cited to support such a contention.

For the defendants, En Abazafree the learned Federal Counsel submitted that the Deputy Minister had correctly exercised his powers under s 4(1) of the Ordinance in issuing the restriction order on the plaintiff and there was no question of him invoking the wrong limb of s 4(1) as the Deputy Minister in his affidavit-in-reply had averred that he was satisfied that the activities of the plaintiff were prejudicial to public order. It was further submitted that the court is not empowered to examine the factual basis in which the Deputy Minister declared his satisfaction on the issuance of the restriction order. The learned federal counsel also submitted that even if I was right in my earlier decision in *Chia Khim Seng v Deputy Minister of Home Affairs & Ors*, the grounds of detention and the allegation of facts made known to the plaintiff in the present case can be distinguished from that earlier case. In the present case, it was contended for the defendants that the plaintiff was merely a member of a secret society and that it had not been shown in clear terms that the plaintiff had already been engaged in any criminal activities involving violence. A reference to the allegation of facts merely stated that the plaintiff had been attending the oath-taking ceremonies of the secret society on two occasions.

On this point, learned counsel for the plaintiff however submitted that it is already settled law in this country that whilst the grounds of detention as stated in the detention order — or, as in the present case, the grounds upon which the restriction order was made — are open to challenge if alleged to be not within the scope of the legislation, the allegation of facts is not subject to review (see the case of *Minister of Home Affairs Malaysia & Anor v Karpal Singh* [1988] 3 MLJ 29). Hence it was impressed upon me that the court is precluded from referring to the allegation of facts to ascertain whether the plaintiff was actually involved or not in crimes involving violence. With respect, I cannot agree with this contention of learned counsel for the plaintiff that the court could not refer to the allegation of facts. I am of the view that in referring to the allegation of facts as in the present case, it does not mean that the court is reviewing or challenging them as being not within the scope of the Ordinance. The court in this instance is only examining the allegation of facts that have been made known to the plaintiff for the purpose of ascertaining whether they appear to be consistent and within the purview of the stated purpose of any of the two relevant limbs of s 4(1) of the Ordinance. A scrutiny of the grounds upon which the restriction order is made and of the allegation of facts is necessary to ascertain whether the Deputy Minister had applied his mind properly to the correct and appropriate limb of s 4(1) of the Ordinance under which he is to issue the restriction order. Failure to do so would tantamount to a non-compliance with the procedural requirement of the Ordinance governing such act or decision of the Deputy Minister which empowers the court to exercise its powers of judicial review. LC Vohrah J, in delivering the judgment of the Supreme Court on this point in the case of *Menteri Hal Ehwal Dalam Negeri & Anor v Lee Gee Lam and another application* had stated, inter alia, at p 678 as follows:

> We would conclude by saying that in determining the propriety or legality of a detention order made under s 4(1), the satisfaction of the Minister has to be considered in the light of the limbs under which he acted. The determination of the question as to whether he addressed his mind to the relevant limb or for that matter to both the limbs in making his detention order is a procedural matter and if it is shown that there is some doubt as to which particular limb the Minister applied his mind to or whether he applied his mind to both the limbs together in grounding his order, the benefit of the doubt must be given to the detenu.

Applying the above-quoted reasonings as laid down in that case, I am of the view that by looking into the grounds upon which the restriction order is made and the allegation of facts made known to the plaintiff, it would appear that there is some doubt as to whether the Deputy Minister had invoked the correct limb in issuing the restriction order. The grounds upon which the restriction order was made had stated that the plaintiff is an active member of a secret society committing criminal activities involving violence. In the same grounds, it was also stated that the action of the plaintiff was prejudicial to public order. I am of the view that being a member of a secret society and committing criminal activities involving violence cannot appropriately fit into the first limb of s 4(1) of the Ordinance

as being acting in a manner prejudicial to public order; more appropriately, it falls within the purview of the second limb of s 4(1) of the Ordinance as being crimes involving violence. As regards the allegation of facts made known to the plaintiff which showed that the plaintiff was merely a member of a secret society and that he had not engaged himself as yet in criminal activities involving violence as contended on behalf of the defendants, I am of the view that the allegation of facts cannot be read in isolation but must be read together with the grounds upon which the restriction order was made. I find as a fact that having examined the grounds upon which the restriction order was made and the allegation of facts in their entirety, the restriction order and the extension order issued by the Deputy Minister on the plaintiff would appear to be defective due to non-compliance with the provision of s 4(1) of the Ordinance.

The second ground advanced on behalf of the plaintiff was that until the issuance of the restriction order by the Deputy Minister on 19 November 1994, the plaintiff had been under detention for a total period of 67 days. The facts of this case showed that the plaintiff was first arrested on 11 September 1994. In the affidavit of the police officer filed in support of the defendants' case, it was however averred that the plaintiff was only arrested for the purpose of investigation under s 3 of the Ordinance on 23 September 1994. I find that the defendants in their affidavits have not given any explanation for the detention of the plaintiff from 11 September 1994 to 23 September 1994 ('the relevant period'). I am of the view that it is necessary for the defendants to explain whether there was a lawful authorization of the detention of the plaintiff for the relevant period because under s 3(3) of the Ordinance, the police can detain the plaintiff for the purpose of investigation for only a period not exceeding 60 days. I could not agree with the contention of the learned federal counsel when he submitted that there was no necessity to state and explain as regards the detention of the plaintiff as from 11 September 1994 because from that period onward until 23 September 1994, the plaintiff could have been arrested and detained under any other relevant law. In my view, it remains the duty of the defendants as a detaining authority to prove that the plaintiff was lawfully detained at all material times from 11 September until the date of the restriction order issued by the Deputy Minister on 19 November 1994. It would appear that it is only from the point of view of the defendants that as from 23 September until 19 November 1994 there was a lawful authorization of the detention of the plaintiff under s 3(3) of the Ordinance but it is stark clear that there is no lawful authorization of the detention of the plaintiff for the relevant period. I am of the view that since there is no affidavit affirming the validity of the detention of the plaintiff for the relevant period, a doubt therefore exists as to whether the detention of the plaintiff during that relevant period was legal. It is trite law that an affidavit must reply specifically to allegations made, and if it does not then those allegations not replied to must be taken to have been accepted (see the case of *Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd* [1986] 1 MLJ 382). In the circumstances of this case, I have to take the view that since the defendants are not in a position to

explain and show there is a lawful authorization of the detention of the plaintiff for the relevant period, then the detention of the plaintiff from 23 September 1994 onwards would still constitute an unlawful detention because the detention on 23 September 1994 had flowed from the earlier unlawful detention effected on 11 September 1994. It is my view that if the detention of a person is a continuation of an earlier unlawful detention, then the second or subsequent detention is unlawful (see the case of *Baharuddin bin Kamsin v Pihak Berkuasa Sidang Panglima Armada Pengkalan TLDM Lumut* [1996] 4 MLJ 184). On this ground alone, I am inclined to hold that the arrest and the detention of the plaintiff was unlawful.

The third ground advanced on behalf of the plaintiff was that there had been a breach of the provision of s 3(3)(c) of the Ordinance wherein the police officer designated by the Inspector General of Police to report the circumstances of the arrest and detention of the plaintiff to the Deputy Minister had failed to apply his mind properly to the report before he referred the matter to the Deputy Minister. It was submitted for the plaintiff that from the affidavit filed by the designated police officer who was a deputy director of the Criminal Investigation Department in Bukit Aman, Kuala Lumpur it was shown that the said police officer took only five minutes to decide to refer the matter to the Deputy Minister. In the circumstances of the case, it was contended that he had acted mechanically and as a mere rubber stamp. The case of *Tan Yap Seng v Ketua Polis Negara & Ors* [1991] 2 CLJ 1400 was cited by learned counsel for the plaintiff wherein Edgar Joseph Jr J (as he then was), inter alia, had this to say on this point at pp 1401–1402:

> ... my view is that it would, prima facie, be wrong for the designated officer to submit his report to the Minister immediately. By 'immediately', I mean automatically without any interval of time, for had he done so, it could be argued, with considerable justification, that he could not have directed his mind to the particular circumstances of the detainee's case. In other words, he would lay himself open to the attack that he had acted as a mere rubber stamp.

The case of *Yap Hai Sing v Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor* [1995] 3 AMR 2120 was also cited for the plaintiff wherein in that case Abdul Kadir Musa JC (as he then was) on this point, inter alia, held that bearing in mind the 20 minutes between the receipt of the report and transmission to the Minister, it was clear that the designated officer could not have applied his mind as required before transmitting the report to the Minister. As regards the observation made on this point by Edgar Joseph Jr J (as he then was) in the case of *Tan Yap Seng v Ketua Polis Negara & Ors*, I am of the view that the facts in that case can be distinguished from that of the present case. In that case, the designated officer in his affidavit merely stated that he submitted the report forthwith to the Minister upon receipt by him from his subordinate officer leading the learned judge to conclude that the use of the word 'forthwith' would mean that there was no interval of time at all for the designated officer to apply his mind to the particular circumstances of the detainee's case. However, in the present case, there was an interval period of five minutes between the receipt by the designated officer from his subordinate officer of the report and the

transmission of the said report to the Deputy Minister. I am of the view that the length of time needed for the designated officer to apply his mind before he submits the report to the Deputy Minister is not of paramount importance. What is most important is whether the designated officer had really applied his mind to the matter before him and was satisfied that the matter be referred to the Deputy Minister. As for the present case, I find that the designated officer in his affidavit had averred that he had studied the matter before him and was satisfied that the matter be reported to the Deputy Minister. On this point, I am also of the view that it cannot be said that the designated officer had only the opportunity to study the circumstances pertaining to the arrest and detention of the plaintiff within the five minutes he received the report from his subordinate officer before he reported the matter to the Deputy Minister. Being a designated officer, surely he could have earlier been acquainted with the circumstances of the arrest and detention of the plaintiff before he received the report as he had the control of the conduct of the investigation of the plaintiff by his subordinate officers. The report received by him from his subordinate officer was merely for the purpose of formally reporting and transmitting it to the Deputy Minister. In the circumstances of this case, I would therefore reject the plaintiff's contention that the designated officer had not applied his mind properly and sufficiently before transmitting the report to the Minister.

In the final analysis, as I have found that the restriction order and the extension order issued by the Deputy Minister on the plaintiff were defective due to non-compliance with the provision of s 4(1) of the Ordinance — and also the fact that I have found there was no lawful authorization of the arrest and detention of the plaintiff — I would have to declare the detention of the plaintiff as being unlawful. I therefore make an order that the plaintiff is to be released forthwith from the detention made under the order of the extension of the restriction order dated 19 November 1996. As to cost of this proceeding, I make no order as to cost since counsel for the plaintiff at the outset of the hearing had applied orally to the court to withdraw the plaintiff's prayer for cost. On this issue of cost, I find that cost being at the discretion of the court and noting that the declaration sought for by the plaintiff if successful had the effect of the court making a similar order as to a successful applicant in a criminal application case for a writ of habeas corpus ad subjiciendum, I would not have ordered cost to the plaintiff anyway.

Application allowed.

Reported by Hanim Kamaruddin